Bayan Marina Yacht Club Bhd & Anor v Mayban Trustees Bhd

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24-996 OF 2002

KAMALANATHAN RATNAM J

19 DECEMBER 2002

Trusts and Trustees — *Express trust — Construction of trust deed — Club membership agreement — Whether the second plaintiff authorized to hold Premier Individual Memberships — Whether first plaintiff authorized to sell to second plaintiff Premier Individual Memberships in the Club — Whether such individuals named by the second plaintiff should be accepted and recognized as holders of the Premier Individual Memberships in the Club with voting rights — Whether free individual memberships could be given to each purchaser of a condominium*

The first and second plaintiffs had agreed to jointly develop and construct the Bayan Marina Yacht Club ('the Club'). The first plaintiff was to sell or offer for sale to members of the public memberships in the Club. Both plaintiffs had entered into a deed of trust and appointed the defendant as trustee for the members in relation to the memberships purchased and/or to be purchased by them. The second plaintiff had allegedly advanced a loan to the first plaintiff for the construction of the Club and offered to purchase from the latter, 236 Premier Individual Memberships in the Club at the rate of RM35,000 per membership amounting to RM8,260,000 and for the said sum to be set off from the loan. However, the second plaintiff only purchased 222 Premier Individual Memberships in the Club amounting to RM7,770,000. The reason the second plaintiff bought the memberships was to give a free complimentary membership to each and every purchaser of a condominium unit in the second plaintiff's project. Having been informed of the purchase, the defendant informed the first plaintiff that the second plaintiff could not purchase the memberships because such memberships could only be purchased by individuals since the terms and regulations relating to the said memberships were for individuals only. The plaintiffs thus filed this originating summons and sought declarations, inter alia: (i) that the second plaintiff be accepted and recognized as holding such memberships and vested with such powers as conferred on such members pursuant to the trust deed; (ii) that the first plaintiff was authorized to sell to the second plaintiff the Premier Individual Memberships in the Club; and (iii) that such individuals named by the second plaintiff be accepted and recognized as holders of the Premier Individual Memberships in the Club with voting rights. The defendant argued that if such declarations were granted and since each membership had a voting right, then with a 222 member voting power, the plaintiffs could easily the determine the fate of the Club.

Held, dismissing the plaintiffs' application with costs: A

(1) Under the membership agreement annexed to the said trust deed, 'Individual Membership' was clearly defined as membership granted by the first plaintiff to an individual. Â company like the second plaintiff could only hold a corporate membership. This type of membership was also defined in the said membership B agreement as membership granted to an 'incorporated body or an incorporated association, a registered firm or other entity not being a natural person'. Therefore, the second plaintiff ought to be given a corporate membership and not 222 individual memberships. Any deviation on this would tantamount to varying the terms of the trust deed and the membership agreement C without the consent of the defendant as the trustee for the members (see pp 103I–104B).

(2) The court also accepted the defendant's argument that since with each membership, a right to vote at a members meeting accrued, then with a 222 member voting power, the plaintiffs could easily D determine the fate of the Club including granting further extension dates for the completion, change of use or even relocation of the Club as proposed by the first plaintiff which was strongly objected by the members (see p 104B–C).

(3) All monies for the memberships in the Club have to be paid into the trust account held by the defendant. Payments out of such E trust account for the development of the Club would be made only by the defendant upon presentation of the relevant architect's certificate. Thus, the defendant could monitor the use of the monies by the first plaintiff. However with the proposal to contra the alleged advances purportedly made by the second plaintiff against the payments in respect of the 222 individual F memberships, what would happen is that the defendant would not be able to monitor the use of the monies. It was clear that the rights of the existing members of the Club would be severely prejudiced as a result of these acts of the plaintiffs as the alleged contra arrangement between the first plaintiff and the second G plaintiff was in violation of the spirit as well as the provisions of the trust deed (see p 104C–F).

(4) The prospectus prepared by the first plaintiff and the trust deed made provision for Premier Individual Members and provision for payment of membership fees. There was no provision for individual membership to be given free with a housing project. If H indeed there was envisaged such a scheme for free memberships to residential unit buyers, an express category under the trust deed to this effect, ought to have been created (see p 104H–I).

[Bahasa Malaysia summary I

Plaintif-plaintif pertama dan kedua bersetuju untuk bersesama membangun dan membina Bayan Marina Yacht Club ('Kelab

tersebut'). Plaintif pertama hendaklah menjual atau membuat tawaran jualan kepada ahli-ahli keahlian-keahlian awam dalam Kelab tersebut. Kedua-dua plaintif telah menyempurnakan satu amanah suratikatan dan melantik defendan sebagai pemegang amanah berkaitan keahlian-keahlian yang telah dibeli dan/atau yang akan dibeli oleh mereka. Plaintif kedua telah mendahulukan pinjaman kepada plaintif pertama untuk pembinaan Kelab tersebut dan membuat tawaran untuk membeli daripadanya, 236 Premier Individual Memberships dalam Kelab tersebut pada kadar RM35,000 untuk satu keahlian berjumlah RM8,260,000 dan bagi jumlah tersebut dijadikan penolakan daripada pinjaman tersebut. Namun begitu, plaintif kedua hanya membeli 222 Premier Individual Memberships dalam Kelab tersebut berjumlah RM7,770,000. Sebab plaintif kedua telah membeli keahlian-keahlian tersebut adalah untuk memberikan keahlian percuma kepada setiap dan semua pembeli sebuah unit dalam projek plaintif kedua. Setelah dimaklumkan tentang pembelian yang telah dibuat, defendan memberitahu plaintif pertama bahawa plaintif kedua tidak boleh membeli keahlian itu kerana keahlian tersebut hanya boleh dibeli oleh individu-individu kerana terma-terma dan peraturan-peraturan berhubung keahlian adalah untuk individu-individu sahaja. Plaintif-plaintif oleh itu telah memfailkan saman pemula ini dan memohon beberapa deklarasi, antara lain: (i) agar plaintif kedua diterima dan diiktiraf sebagai memegang keahlian-keahlian sedemikian dan diberikan kuasa sebagaimana yang diberikan ke atas ahli-ahli menurut amanah suratikatan; (ii) agar plaintif pertama diberi kuasa untuk menjual kepada plaintif kedua Premier Individual Memberships dalam Kelab tersebut; dan (iii) agar individu-individu yang dinamakan oleh plaintif kedua diterima dan diiktiraf sebagai pemegang-pemegang Premier Individual Memberships dalam Kelab tersebut. Defendan berhujah sekiranya deklarasi-deklarasi sedemikian diberikan dan memandangkan setiap keahlian mempunyai satu hak mengundi, adalah mudah untuk plaintif-plaintif menentukan nasib Kelab tersebut.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Di bawah Perjanjian Keahlian yang dilampirkan bersama amanah suratikatan, 'Individual Membership' dengan jelas ditafsirkan sebagai keahlian yang diberikan oleh plaintif pertama kepada seorang individu.Sebuah syarikat seperti plaintif kedua hanya boleh memegang keahlian korporat. Jenis keahlian ini juga ditafsirkan dalam perjanjian keahlian sebagai keahlian yang diberikan kepada sebuah 'incorporated body or an incorporated association, a registered firm or other entity not being a natural person'. Oleh itu, plaintif kedua sepatutnya diberikan keahlian korporat dan bukan 222 keahlian-keahlian individu. Sebarang penyelewengan berhubung perkara ini sama seperti mengubah terma-terma amanah suratikatan dan perjanjian keahlian tanpa

persetujuan defendan sebagai pemegang amanah untuk ahli-ahli tersebut (lihat ms 103I–104B).

(2) Memandangkan dengan setiap keahlian, terdapat satu hak untuk mengundi di suatu mesyuarat ahli-ahli, maka dengan 222 kuasa undi ahli-ahli, plaintif-plaintif dengan mudah boleh menentukan nasib Kelab tersebut termasuklah memberikan tarikh-tarikh lanjutan untuk penyelesaian, mengubah kegunaan atau memindahkan lokasi Kelab tersebut sebagaimana yang dicadangkan oleh plaintif pertama (lihat ms 104B–C).

(3) Segala wang untuk keahlian dalam Kelab tersebut hendaklah dibayar ke dalam akaun amanah yang dipegang oleh defendan. Pembayaran keluar akaun amanah untuk pembangunan Kelab tersebut hanya boleh dibuat oleh defendan sekiranya sijil arkitek berkaitan dikemukakan. Oleh itu, defendan boleh mengawal penggunaan wang oleh plaintif pertama. Namun begitu dengan cadangan untuk mengkontrakan pendahuluan yang dikatakan dibuat oleh plaintiff kedua terhadap bayaran 222 keahlian-keahlian individu, apa yang berlaku adalah defendan tidak akan dapat mengawal penggunaan wang tersebut. Adalah jelas bahawa hak-hak ahli-ahli yang ada dalam Kelab tersebut akan diprejudiskan akibat daripada perbuatan-perbuatan plaintif-plaintiff kerana pengurusan kontra yang dikatakan antara plaintif pertama dan plaintif kedua adalah bertentangan dengan maksud yang tersirat dan peruntukan amanah suratikatan tersebut (lihat ms 104C–F).

(4) Prospektus yang disediakan oleh plaintif pertama dan amanah suratikatan menyediakan peruntukan untuk Premier Individual Members dan peruntukan untuk pembayaran yuran keahlian. Tiada peruntukan untuk keahlian-keahlian individu yang diberikan percuma dengan satu projek perumahan. Jika memang terdapat skima untuk keahlian percuma kepada pembeli-pembeli unit rumah, satu kategori yang nyata di bawah amanah suratikatan tersebut, sepatutnya diwujudkan (lihat ms 104H–I).]

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No P–02–885 of 2002.]

Notes

For cases on the construction of trust deeds, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1816–1819.

Arumugam Ganapathy (*Ghazi & Lim*) for the plaintiffs.

Yoong Sin Min (*YT Chong* with her (*Shook Lin & Bok*) for the defendants.

Kamalanathan Ratnam J: The second plaintiff (formerly known as Eternal Resources Sdn Bhd) purchased from the Penang Development

A Corporation the entire reclaimed land along the south eastern foreshore of Penang Island under qualified titles as leasehold land for a term of 99 years. Part of the entire reclaimed land identified as Plot 35 and measuring approximately 11,994 sq m ('the said land') had been earmarked for development into a marine yacht club and recreation centre and other amenities to be known as the Bayan Marine Yacht Club, subsequently B known as Bayan Bay Marine Club ('the Club'). The second plaintiff then sold the said land to the first plaintiff who jointly with the second plaintiff was to develop and construct the Club on the said land. The first plaintiff was to sell or offer for sale to members of the public memberships in the Club which would entitle such persons who have purchased or will be C purchasing such memberships to nominate another person or themselves as the case may be to use and enjoy in common with other persons such designated facilities and amenities provided by the first plaintiff at the Club.

Pursuant to Division 5 of Part IV of the Companies Act 1965 and the Policy Guidelines and Requirements for Sale of Club Memberships issued D by the Malaysian Registry of Companies which came into effect on 8 September 1992, the first plaintiff is required to enter into a deed for the appointment of a trustee for the members in relation to memberships purchased and/or to be purchased by them. And so on 3 July 1996, the first and second plaintiffs entered into a deed of trust with the defendant E whereby the defendant agreed to act as trustee for the benefit of the members upon the terms and conditions contained in the deed of trust and to receive all membership monies to be paid by the future members and to hold such monies in trust accounts to be released to the first plaintiff upon determination of the defendant that any necessary conditions have been complied with.

F

Plaintiffs' case

It is the second plaintiff's case that sometime before 31 August 1997, it had advanced to the first plaintiff the sum of RM13,697,564.48 free of interest ('the loan') to enable the first plaintiff to pay its contractors and other G parties for the construction of the Club. By a letter dated 15 January 1997, the second plaintiff offered to purchase from the first plaintiff, 236 Premier Individual Memberships in the Club at the rate of RM35,000 per membership amounting to RM8,260,000 and for the said sum to be set off from the loan advanced by the second plaintiff to the first plaintiff. By its letter dated 17 January 1997, the first plaintiff accepted the second H plaintiff's said offer. However by subsequent letters, the second plaintiff actually purchased 222 such memberships amounting to RM7,770,000. The reason the second plaintiff purchased the said 222 memberships was to give free complimentary membership to each and every purchaser of a unit in the 'Bayan Bay Penang' project in which the second plaintiff was I constructing a project called 'Marina Villa' with condominiums.

This set off of the RM7,770,000 was reflected in the accounts of both the first and second plaintiffs on 31 August 1997 and was also reflected in

the statutory account maintained by the first plaintiff as of 31 August 1997. By a letter dated 11 December 1998, the first plaintiff informed the defendant of the sale of 222 Premier Individual Memberships in the Club to the second plaintiff. By its letter dated 4 January 1999, the defendant informed the first plaintiff that the second plaintiff cannot purchase 222 Premier Individual Memberships in the Club because such Premier Individual Membership could only be purchased by individuals since the terms and regulations relating to the said membership are for individuals only.

The plaintiffs thus filed this originating summons and sought the following orders:

(a) a declaration that pursuant to the trust deed the first plaintiff is authorized to sell to the second plaintiff the Premier Individual Memberships in the Club and that the names of such individuals as provided by the second plaintiff be registered as the Premier Individual Members of the Club;

(b) a declaration that until such time as the second plaintiff provided the names of the individuals who are to be registered as Premier Individual Members, the first plaintiff be authorized to register such memberships in the name of the second plaintiff;

(c) a declaration that the defendant do accept and recognize such individuals as named by the second plaintiff as holders of Premier Individual Memberships in the Club with voting rights;

(d) a declaration that until such time as the persons named by the second plaintiff are registered as Premier Individual Members, the defendant do accept and recognize the second plaintiff as holding such memberships and vested with such powers as conferred on such members pursuant to the trust deed;

(e) that there be liberty to apply;

(f) that costs be in the cause; and

(g) such further or other relief as the court deems fit and proper.

The defence

In his affidavit in reply, the chief executive officer of the defendant pointed out that by the terms of the trust deed, there were two broad categories of members namely, individual member and corporate member and that the defendant as the trustee, was to establish a trust account for the purpose of depositing and holding on trust all membership fees received by the first plaintiff as operator of the Club, prior to the completion of the development of the Club. It was also a term of the trust deed that upon completion of the Club, the defendant was to release to the first plaintiff the membership fees deposited in the said trust account either progressively upon presentation of architects' or surveyors' certificates of expenditure incurred, or upon the first plaintiff furnishing to the defendant security equal in value to the amount the first plaintiff requests to have released to it. However in the

A event the Club is not completed and the Club scheme is determined, due to the default of the first plaintiff and/or the second plaintiff, all monies received by the defendant should be distributed to the members. The trust deed also provided that the Marina was to have been completed by December 1996 and the Clubhouse by December 1997. To enable the first plaintiff to sell the memberships to the public, it was a requirement that the B first plaintiff issue a prospectus to the public. The defendant averred that the first plaintiff had issued prospectuses for 1996, 1997 and 1998 only and that the last prospectus expired on 31 January 1998 and as of that date there were 252 fully paid members and 39 non-fully paid members registered in the register of members.

C It is also the defendant's case that to date the Club remains uncompleted and appears abandoned. The plaintiffs had failed to complete the Club as agreed by December 1997. The plaintiffs and the defendant met the members at extraordinary general meetings held on 28 January 1999, 19 May 2000, 24 June 2000 and on 4 November 2000 to hear the members' concerns over the continued non-completion of the Club. The D defendant averred that the plaintiffs had repeatedly assured the members that the Club would be completed.

At the meeting held on 24 June 2000, the members agreed to a conditional extension of the completion date of the Club to 31 December 2002 and for a supplementary trust deed to be executed towards this effect. E By a letter dated 29 January 2001, the solicitors for the plaintiffs only notified the Registrar of Companies of the proposed amendments to the said trust deed but did not forward a draft supplementary trust deed for the registrar's approval. By a letter dated 14 March 2002, the Registrar of Companies imposed a compound fine of RM10,000 for the first plaintiff's failure to complete the Club within the stipulated date of December 1997. F Subsequently on 9 May 2002, the Companies Commission of Malaysia ('CCM'), (formerly the Registrar of Companies) gave a conditional approval to the proposed conditional extension of the completion date of the Club to 31 December 2002. One of the conditions imposed by the CCM was that the directors of the first plaintiff do give an undertaking to CCM that if the first plaintiff failed to complete the Club by the extended G date, the first plaintiff would be liable for any claims, damages and costs that might arise out of the said non-completion. The defendant avers that the condition has yet not been met.

As a result of this action commenced against the defendant, the defendant sought a meeting with the members on 29 June 2002 who clearly H mandated the defendant to oppose this application of the plaintiffs.

Findings of the court

It is expressly stated in the trust deed that a Premier Individual Membership is available to individuals above the age of 21 years and to the individual's I family. Under the Membership Agreement annexed to the said trust deed, 'Individual Membership' is clearly defined as membership granted by the first plaintiff to an individual. It is my judgment that a company like the

second plaintiff can only hold a corporate membership. This type of membership is also defined in the said membership agreement as membership granted to an 'incorporated body or an incorporated association, a registered firm or other entity not being a natural person'. I hold that the second plaintiff ought to be given a corporate membership and not 222 individual memberships. Any deviation on this would tantamount to varying the terms of the trust deed and the membership agreement without the consent of the defendant as the trustee for the members.

I accept the defendant's submission that since with each membership, a right to vote at a members meeting is accrued, then with a 222 member voting power, the plaintiffs can easily determine the fate of the Club including granting further extension dates for the completion, change of use or even relocation of the Club as proposed by the first plaintiff but strongly opposed by the members at the meeting on 21 July 2001.

As the matter stands, all monies for the memberships in the Club have to be paid into the trust account held by the defendant. Payments out of such trust account for the development of the Club would be made only by the defendant upon presentation of the relevant architect's certificate. This in my view, permits the defendant to monitor the use of the monies by the first plaintiff. However with the proposal to contra the alleged advances purportedly made by the second plaintiff against the payments in respect of the 222 individual memberships, what would happen is that the defendant would not be able to monitor the use of the monies. Further, I take note of the defendant's contention that the defendant has no knowledge as to whether the alleged advances were properly incurred by the first plaintiff. It is clear that the rights of the existing members of the Club would be severely prejudiced as a result of these acts of the plaintiffs as the alleged contra arrangement between the first plaintiff and the second plaintiff is in violation of the spirit as well as the provisions of the trust deed.

The defendant has exhibited numerous colored photographs which clearly show that the said project has indeed been abandoned. The defendant has averred that it is unable to confirm that the alleged value of works done total RM34,700,846.22 as affirmed by the second plaintiff in its affidavit in reply.

It is the second plaintiff's case that it intends to give to each of the purchasers of a condominium, a free individual membership of the Club. However, the prospectus prepared by the first plaintiff and the trust deed make provision for Premier Individual Members and provision for payment of membership fees. There is no provision for individual membership which are given free with a housing project. It is my judgment that if indeed there was envisaged such a scheme for free memberships to residential unit buyers, an express category under the trust deed to this effect, ought to have been created. To my mind, it must be quite unnerving to the existing members of the Club who have already suffered from the non-completion of the Club, to now face the prospect of their voting power being diluted by

this application. Good conscience must prevail and therefore I had no hesitation in dismissing this application of the plaintiffs with costs.

Plaintiffs' application dismissed with costs.

Reported by Ezatul Zuria Azhari